KESANG LEASING SDN. BHD.

v.

TANGGONG SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[CIVIL SUIT NO. C 4188 OF 1985]
1 AUGUST 1986

CIVIL PROCEDURE: *Application to set aside judgment in default of appearance - Liberty to file appearance and defence - Whether judgment in default a regular judgment - Defence on the merits - Doctrine of estoppel.*

This was an application by the 1st defendant for an order of the Court to set aside judgment in default of appearance obtained by the plaintiffs on 26 September 1985. The 1st defendant company also asked the Court that it be at liberty to file its appearance and defence within 14 days from the date of the order of the Court.

Held:

[1] With regard to the argument of defendants' Counsel that the plaintiffs were estopped from proceeding further until their solicitors had replied to his letter dated 25 January 1985, there was no merit whatsoever in that argument. There was no evidence that the doctrine of estoppel applied in the present case.

[2] In the circumstances the judgment entered against the 1st defendant was a regular judgment.

[3] The 1st defendant had not raised any defence on the merits. It had failed to disclose any arguable or triable issues.

[Application dismissed with costs.]

Cases referred to:

P.T. Pelajaran Nasional Indonesia v. Joo Siang & Co. Ltd. [1959] 2 MLJ 113
Bank Bumiputra Malaysia Bhd. & Anor v. Lorrain Esme Osman [1986] 1 MLJ 426

Legislation referred to:

Companies Act 1965, ss. 4 & 350
Evidence Act 1950, s. 92
Rules of the High Court 1980, O. 62 r. 4(1)(b)

For the plaintiffs - S.L. Chin; M/s. Skrine & Co.
For the defendants - Ahmad Shah Balendran; M/s. Balendran Chong Haranay & Bodi

JUDGMENT

Zakaria Yatim J:

This is an application by the first defendant for an order of the Court to set aside judgment in default of appearance obtained by the plaintiffs on 26 September 1985. The first defendant company also asks the Court that it be at liberty to file its appearance and defence within fourteen days from the date of the order of the Court.

The plaintiffs' claim is for a sum of RM56,172.93 being damages suffered by them as a result of a breach of an equipment lease agreement by the first defendant. Under the lease agreement, which was concluded between the plaintiffs and the first defendant in January 1984, the plaintiffs agreed to let and the first defendant agreed to take on lease one unit of AB Dick offset duplicator model 375CD, and one unit of Toko Platemaker NF80 for a period of thirty-six months commencing on 31 January 1984. The terms of the lease agreement were, *inter alia*, as follows: The first defendant would pay the plaintiffs a total lease rentals of RM56,793.60 payable in advance by RM4,732.80 and the balance by thirty-three equal monthly rentals of RM1,577.60 each commencing on 3 January 1984. The first defendant was liable to pay the plaintiffs interest at the rate of two percent per month on any monies payable thereunder which might from time to time become due and payable. Should the first defendant fail to pay any sums payable under the lease or to observe or perform any of the provisions of the lease agreement, the plaintiffs would, without prior notice of demand to the first defendant, terminate the lease agreement and retake possession of the said equipment. Upon early termination of the lease agreement the first defendant would pay to the plaintiffs: (1) an amount equal to the aggregate of the residual value of the equipment; (2) the unpaid balance of the total lease rentals; and (3) other charges and expenses.

Apart from the lease agreement, two further agreements were signed by the second, third, fourth and fifth defendants whereby they jointly and severally guaranteed the due payment and performance by the first defendant of all sums due and all obligations under the lease agreement. The second, third, fourth and firth defendants further agreed to indemnify the plaintiffs against their loss and damage arising out of the plaintiffs having entered the lease agreement with the first defendant.

The plaintiffs claimed that the first defendant was in breach of the lease agreement when it failed to pay the rentals due from August 1984. Upon such default, the plaintiffs duly repossessed the said equipment and terminated the lease agreement on 2 October 1984.

Mr. Ahmad Shah Balendran, Counsel for the first defendant submitted that the judgment in default of appearance was not a regular judgment. He said that the plaintiffs' solicitors knew that he was the solicitor acting for the first defendant. According to him, when the plaintiffs' solicitors wrote a letter of demand dated 19 April 1985 addressed to the first defendant, the first defendant engaged him to act on its behalf. According to Mr. Balendran, he wrote a letter to the plaintiffs' solicitors on 25 April 1985 complaining that the equipment was faulty and the plaintiffs failed to repair the equipment. He also stated in the letter that his client accordingly delayed payment of the instalments and in consequence of which the equipment was repossessed. The plaintiffs' solicitors responded to Mr. Balendran's letter by stating that they would "revert to you upon further instructions from our clients". Since then there was no correspondence between the two firms of solicitors. Mr. Balendran submitted that the plaintiffs and their Solicitors were estopped from taking any other proceedings until they had communicated by correspondence to the first defendant's solicitors. He contended that the judgment in default of appearance was therefore, an irregular judgment.

It is clear from the affidavit of service dated 10 September 1985 that the writ of summons was sent by the plaintiffs' solicitors by registered post dated 21 August 1985 to the registered office of the first defendant at No. 22, Bangunan Lembaga Kemajuan Negeri Pahang, Jalan Bukit Ubi, Kuantan, Pahang.

The question for the Court to consider is whether it was proper for the plaintiffs to post the writ of summons to the registered address of the first defendant when correspondence existed between the solicitors of both the plaintiffs and the first defendant.

The first defendant is a private limited company. Under s. 350 of the Companies Act 1965, a document may be served on a company by leaving it at or sending it by registered post to the registered office of the company. The word "document" under s. 350 includes summons, order or other legal process and notices and register. (See s. 4 of the Companies Act). Order 62 r. 4(1)(b) of the Rules of the High Court 1980 also provides that where an action is against a corporation, the writ may be served by sending a copy of it by registered post addressed to the corporation at the office.

In *P.T. Pelajaran Nasional Indonesia v. Joo Siang & Co. Ltd.* [1959] 2 MLJ 113, it was held that where the law provides a particular method of service or form of procedure for effecting service on a particular place, then there must be strict compliance with these provisions. In the instant case, the plaintiffs had effected service of the writ in strict compliance with the provisions of s. 350 of the Companies Act and O. 62 r. 4(1)(b). The writ was delivered by the Kuantan Postal authorities but was subsequently returned by the postal authorities to the plaintiffs' solicitors with the remarks "return" and "enggan terima". In my opinion, the fact that the writ was returned to the plaintiffs' solicitors with those remarks clearly shows that the first defendant was deliberately evading service or refusing to accept service.

The question that arises here is whether the plaintiffs or their solicitors were under a legal obligation to serve the writ on the first defendant's solicitors since the plaintiffs and their solicitors knew that the first defendant had engaged a firm of solicitors to act on its behalf. Mr. Balendran referred to a letter dated 25 January 1985 written by him on behalf of the first defendant and addressed to the plaintiffs' solicitors. I have read this letter carefully and nowhere in the letter did Mr. Balendran mention that he had instruction to accept service on behalf of the first defendant. A writ may only be served on the defendant's solicitors if the defendant's solicitors have instruction to accept service. In *Bank Bumiputra Malaysia Bhd. & Anor. v. Lorrain Esme Osman* [1986] 1 MLJ 426, the defendant's solicitor told the Court that he had no instruction from his client to accept service. The plaintiffs' solicitors in that case had no alternative but to serve the writ on the defendant by way of substituted service. In the instant case since Mr. Balendran had not indicated in the said letter that he had instruction to accept service on behalf of the first defendant, it was proper for the plaintiffs' solicitors to serve the writ by registered post on the first defendant at its registered office.

With regard to Mr. Balendran's argument that the plaintiffs were estopped from proceeding further until the solicitors replied to his letter dated 25 January 1985, I find no merit whatsoever in that argument. There is no evidence that the doctrine of estoppel applies in the present case.

In the circumstances the judgment in default entered against the first defendant was a regular judgment.

The next question for the Court to consider is whether the first defendant has a defence on the merits.

The affidavit in support of the application to set aside judgment in default of appearance was affirmed by the second defendant on behalf of all the defendants. Attached to the affidavit is the defendants' statement of defence. In the statement of defence the defendants admitted para. 1 of the statement of claim which states that the equipment lease agreement was concluded between the plaintiff and the first defendant. In view of this admission the defendants were bound by the terms of the agreement. The second defendant, in his affidavit averred that the plaintiffs' agent, prior to the execution of the lease agreement, assured the defendants that the plaintiff would arrange for the maintenance and repair of the equipment.

According to him, after a period of eight months, the equipment became defective. In my view, since the defendants had admitted entering into the lease agreement, they are not permitted to bring in other evidence to add to, vary or contradict the lease agreement. (See s. 92 of the Evidence Act 1950). Clause 9.4 of the agreement states that "any representation by the plaintiff, its agent prior to execution of agreement is deemed to be superseded by the agreement."

Mr. Balendran submitted that since the equipment was defective the defendants asked the plaintiffs to carry out the repair work. According to him the plaintiffs did not repair the equipment and the defendants refused to make payment. Under the lease agreement it was not the duty of the plaintiffs to repair the equipment. Clause 10.2 clearly states that the defendants must keep the equipment in serviceable repair and condition and replace all missing, damaged or broken parts.

The second defendant, in his affidavit stated that under Clause 17.2 of the agreement, the plaintiffs were required to dispose of the equipment within one month from the date of repossession. But it is explicit in Clause 17.2 and 17.3 that the plaintiffs were under no obligation to sell the equipment within one month of repossession.

Mr. Balendran submitted that the items of repossession costs, transport, advertising and late charges were not provided for in the lease. I find no basis in his submission. Clause 17.3 of the agreement states that the first defendant has to pay "all costs and expenses .... incurred by the plaintiff in tracing or retaking possession or attempting to trace, retake possession or sell the equipment and any other sums payable under this agreement ..."

In my judgment, the first defendant has not raised any defence on the merits. It has failed to disclose any arguable or triable issues.

I, therefore, dismiss the application with costs.

Also found at [1986] 2 CLJ 437